No. 91-292

Supreme Court, U.S.
FILED
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In The

# Supreme Court of the United States

October Term, 1991

LARRY WALKER,

*Petitioner,*–

*vs.*

TOWNSHIP OF TEWKSBURY, *et al.*,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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September 12, 1991

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the courts below correctly apply the Court's constitutional principles articulated in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) and its progeny, that a taking claim under the Fifth Amendment is not ripe where the landowner has not obtained a final decision and also has not sought compensation through the procedures provided by the State for doing so?

2. Did the courts below correctly apply the Court's constitutional principles articulated in *Butz v. Economou*, 438 U.S. 478 (1978), and other cases, in determining members of municipal planning boards in New Jersey are absolutely immune in their individual capacities from damages actions under 42 U.S.C. § 1983 for quasi-judicial planning board decisions?

## LIST OF PARTIES TO THIS PROCEEDING

Petitioner:

Larry Walker

Respondents:

Tewksbury Township Planning Board

Past and present members of Tewksbury Township Planning Board in their individual capacities:

Gerhard H. Fuchs

Kenneth Lee Hahn

James H. Lynch, Jr.

John P. Madigan

Peter F. Moll

Charles W. Halsey, Jr.

Richard R. Width

Harlan K. Welsh

Robert W. Metcalfe

Robert J. Fritz

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* Party defendants in the United States District Court for the District of New Jersey, but neither appellees in the United States Court of Appeals for the Third Circuit nor respondents herein are: the Township of Tewksbury; the Township Committee of the Township of Tewksbury; past and present members of Tewksbury Township Planning Board in their official capacities, Gerhard H. Fuchs, Kenneth Lee Hahn, James H. Lynch, Jr., John P. Madigan, Peter E. Moll, Charles W. Halsey, Jr., Richard R. Width, Harlan K. Welsh, Robert W. Metcalfe, and Robert J. Fritz.

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*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari. Petitioner conceded in the district court the two issues presented in the petition, and thus, has failed to preserve those issues for this Court's consideration. Petitioner conceded below that the Planning Board members were absolutely immune in their individual capacities from suit under 42 U.S.C. § 1983 for quasi-judicial Planning Board actions. Petitioner also conceded below that his taking claim is not ripe. In any event, as more fully explained *infra*, the decisions below are wholly consistent with the constitutional principles established by the Court.

## STATEMENT OF THE CASE

### A. Proceedings Below

Petitioner Larry Walker instituted this action on February 14, 1989[1] against Tewksbury Township, its governing body, the Township Committee, its Planning Board, and certain past and present members of its Planning Board in both their individual and official capacities. The Complaint alleges that the Planning Board Resolution of December 21, 1988, approving Walker's preliminary major subdivision application, violated his constitutional rights and tortiously interfered with his contract to sell the property (Aa1-9; Sa1-2).[2]

Specifically, Walker alleges in his Complaint that the alleged imposition of a horse trail easement constitutes a taking of property without just compensation (Aa5-6, ¶ 23; Sa2, ¶ 5). He further alleges that a provision for conservation easements in the subdivision approval was improper as well, without, however, specifically stating it as a taking claim in his Complaint (Aa4, ¶ 16; Aa6-7, ¶ 29; Sa2, ¶ 2).

The Planning Board, the Township, the Township Committee, and the individual past and present Planning Board members denied all material allegations, and most specifically, denied that the conservation easement had been imposed and denied that there was any horse trail easement (Aa10-17; Sa3-9).

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1. On the same date, Walker filed an action in the Superior Court of New Jersey seeking direct review of the same Planning Board Resolution of December 21, 1988 on both constitutional and state law grounds and seeking specific performance by the developer who had contracted to purchase the property.

2. As used herein: "Aa" refers to "Appendix of Appellant Larry Walker" and "Sa" refers to "Supplemental Appendix" filed with the Third Circuit.

By bench decision[3] and order of July 6, 1989, the district court granted summary judgment to: (1) Tewksbury Township and the Township Committee on the basis that Walker simply failed to allege any claim against them; (2) the individual past and present Planning Board members in their individual capacities on the basis of absolute quasi-judicial immunity;[4] and (3) the individual past and present Planning Board members in their official capacities on the basis that, with the Planning Board itself as a separately named defendant, their presence was superfluous (Aa32-36; Aa40-41).

On October 27, 1989, the Planning Board filed and served its motion for summary judgment extensively supported by affidavits and certifications (Sa10-12; Aa81-232; Aa68-80).

In response, Walker submitted a brief — nothing more. In reply to the unsupported allegations in Walker's brief, the Planning Board further supported its summary judgment motion with additional affidavits (Aa233-278).

At oral argument on December 4, 1989, Walker's counsel presented two excuses for his lack of preparedness: (1) he thought the Planning Board's summary judgment motion was premature because Walker still owed some discovery to the Planning Board; and (2) he thought the Planning Board's affidavits and certifications supported Walker's contentions (Aa283-21 to 285-10; Aa302-11 to 302-21). After instructing Walker's counsel as to the

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3. Walker has failed to append the bench decision to his petition. It appears in the appendix filed with the Third Circuit (Aa31-39).

4. Walker's counsel expressly conceded and expressly declined to challenge dismissal against the individual defendants in their individual capacities on the ground of absolute quasi-judicial immunity (June 9, 1989 Letter Brief of Walker's counsel; July 6, 1989 Transcript of Argument and Decision, Aa32).

requirements of Fed. R. Civ. P. 56(e) and (f), the district court gave Walker's counsel additional time to supplement the record to support Walker's contentions that the "conditions" of the Resolution were imposed upon him (Aa284-21 to 285-4; Aa304-18 to 305-25; Aa306-19 to 307-25; Aa381). Walker's counsel then submitted an affidavit supplementing the record (Aa309-380).

By Memorandum and Order of January 31, 1990, the district court granted summary judgment to the Planning Board (Pet. App. 8a-23a).[5] The court declined to exercise a *Burford*[6] abstention, giving weighted consideration to the factor that, since Walker was seeking only damages and not judicial surgery to remove "conditions" from the Resolution (as he sought in state court), the maintenance of the federal action was not an "irritant to state-federal relations" (Pet. App. 12a-15a; 15a n.3).

Walker's claims that the alleged exaction of a horse trail easement and conservation easements constituted a taking were disposed of on two bases: (1) the claims were not ripe because Walker failed to use New Jersey's inverse condemnation procedure and further failed to support, factually or legally, his assertion of the inadequacy of the procedure; and (2) in any event, Walker could not establish a taking claim because the undisputed record showed no substantial diminution in value of the property (Pet. App. 15a-18a).

The district court determined Walker's equal protection claim to be "nothing short of frivolous" (Pet. App. 18a) and Walker's procedural due process claim to have "no merit" (Pet. App. 20a).

In granting judgment to the Planning Board on Walker's

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5. "Pet. App" refers to the Appendix to the Petition.

6. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

substantive due process claim also, the district court found that the undisputed facts of record plainly showed that all challenged "conditions" in the Resolution (except one requiring Walker to revise the plans, if necessary, to incorporate requirements of other reviewing governmental agencies) were *proposed* by Walker, *not imposed*, by the Planning Board (Pet. App. 20a-22a).[7]

Dealing with Walker's dual characterization of his tortious interference claim, the Court declined to exercise jurisdiction over it as a pendent state claim and granted judgment on it as a federal claim (Pet. App. 23a).

By its June 25, 1990 Memorandum and Order, disposing of Walker's motion for reconsideration, the district court affirmed its grant of summary judgment to the Planning Board, modifying its basis therefor in one minor respect as to the taking claim. Concluding that, contrary to its earlier opinion, the lack of substantial diminution in value of property is not fatal to a taking claim, the court reposited, as the sole basis for summary judgment on the taking claim, the lack of ripeness of the claim (Pet. App. 25a-27a).

> This does not mean that summary judgment on this claim should be vacated, because *plaintiff admits*, and this Court so held, that the claim is not ripe for review under *Williamson* and its progeny. Plaintiff, however, has filed, or is

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7. Although the district court referred only to Walker's proposed Resolution, it is clear from the preceding portions of the opinion and from the entire record, that the entire record, not merely Walker's proposed Resolution, furnished the support for this conclusion (Pet. App. 21a).

There is no dispute of record that all of the "conditions" challenged by Walker in this action were either: (1) conditions proposed by him as part of his application; (2) conditions to which he expressly agreed; or (3) not conditions at all.

> contemplating filing, an inverse condemnation action in state court, and does not wish to be collaterally estopped from litigating the taking claim based on this Court's earlier discussion concerning the merits of that claim.

(Pet. App. 27a-28a) (emphasis added).[8]

On January 30, 1991 the Third Circuit summarily affirmed the judgment below (Pet. App. 29a-30a). A petition for rehearing was denied on March 28, 1991 (Pet. App. 31a-32a).

**B. Facts**

Walker, a developer, purchased a 130-acre, rural-agricultural tract in Tewksbury Township on November 23, 1987 for $3,000,000 (Aa193; Aa3, ¶ 9; Aa228-229).

On July 20, 1988, Walker agreed to sell the property to Hirschberg Development Company ("Hirschberg")for $5,225,000, title to close after Walker obtained "preliminary major subdivision approval for a 17-lot single family detached subdivision" and "all other government approvals required in connection with such preliminary major subdivision approval" (Aa263-266). Hirschberg agreed to take title subject to deed restrictions against further subdivision, conservation easements, assessments for off-tract

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8. Conceding the taking claim was not ripe, Walker's counsel specifically argued to the district court that the alternate basis for dismissal of the taking claim (there was no taking) should be vacated to permit Walker to institute an inverse condemnation action in the New Jersey courts: "Walker should be granted an opportunity to press an inverse condemnation claim in the New Jersey Superior Court, rather than risk being bound by this Court's determination on the merits of a controversy it has found not properly before it" (Memorandum in Support of Motion for Reconsideration," pp. 2, 9, by Walker's counsel).

improvements associated with an access road, and assessments for other off-tract improvements provided Walker credited Hirschberg for such other assessments (Aa264, ¶¶ 10 to 12; Aa252-15 to 253-22). Walker advised the Planning Board of his contract with Hirschberg in January, 1989, the month after the December 21, 1988 Resolution (Aa251-17 to 252-14; Sa1-2).

The Planning Board is a board created, pursuant to state statute, as an independent approving authority of Tewksbury Township, with authority over subdivision control and site plan review (Aa2, ¶ 6; N.J.S.A. 40:55D-25(a)(2)). In 1988, Walker applied to the Planning Board for preliminary major subdivision approval for 19 residential building lots on his property (Aa3, ¶ 10). The Planning Board conducted five public hearings thereon, from August 17, 1988 to November 28, 1988 (Aa82-83, ¶¶ 2-6; Aa184). At a December 7, 1988 meeting, approval was granted, as memorialized in a Resolution of December 21, 1988 (Aa3-4, ¶¶ 12-13; Sa1-2).

As specified *infra*, there was no dispute of record that the conservation easement was proposed by Walker as part of his comprehensive subdivision application, not imposed by the Planning Board; and there was no horse trail easement.

Prior to the formal application, Walker made an informal presentation to the Planning Board concerning the proposed subdivision and, in connection therewith, distributed to the Planning Board members and adjoining property owners a booklet representing his subdivision plan (Aa192-212, Aa219-12 to 220-15). Therein, Walker represented, as part of his proposal to the Planning Board and the public, that he would grant conservation easements:

> Area A will be a conservation easement for the stream and associated wetland. Area B will be a

> conservation easement to prevent disturbance of the critical slopes. All other critical slopes will be covered by conservation easements.

(Aa204).

In Walker's Sensitive Area Plan, prepared by Walker's own engineer and presented by Walker to the Planning Board as part of his application, Walker expressly indicated the areas of the conservation easement (Aa216, Aa223-3 to 223-20).

During the September 15, 1988 public hearing, Walker again advised, both through his own representations and those of his environmental expert, that an integral part of his subdivision application was his grant of conservation easements to protect all environmentally sensitive areas (Aa121-10 to 121-20; Aa122-20 to 123-1; Aa124-7 to 124-14). During this hearing, Walker's expert opined that a horse trail would have a negligible environmental impact (Aa125-22 to 126-5).

During the final public hearing on November 28, 1988, Walker again promoted the desirability of his subdivision application by referring to the conservation easements he was granting:

> We have large conservation easements there. We could have had 12 driveways along this area weaseling in and out between wetlands because driveways can go through where roads can't. I just wanted to leave it alone. I don't want to have the things, the trees cut down and most of it is not that suitable, any way.
>
> So I just wanted to leave it natural, so that that area remains as is, theoretically, forever.

(Aa172-2 to 172-13). At this hearing, Walker told the Board that his application was "a Planning Board's dream," referring, *inter alia*, to his proposed conservation easement (Aa181-9 to 182-6).

On December 7, 1988, in response to an inquiry, Walker referred to his prior offer to give the Township "25 acres with the restriction that it would be used only for fishing along the Rockaway Creek portion and horse trails within" (Aa335). Walker retreated somewhat on horse trails (Aa333-334), and the Planning Board candidly conceded it could not require horse trails from Walker:

> O.K. Mr. Walker says he doesn't want to give it to us so we are . . . so we are . . . if he doesn't want to give it to us we can't force him because we don't have it in the ordinance, uh, the ordinance.

(Aa341). Shortly thereafter, however, Walker said he would consider the possibility of a horse trail, but would make no commitment (Aa357).

Consistent with his representations throughout the public hearings, Walker's own proposed resolution included the following relevant provisions:

> 2. Conservation easements as illustrated on the plans shall be granted to Tewksbury Township.
>
> * * *
>
> 5. The applicant shall contact the Tewksbury Trails Association and work toward a mutual agreement on including a trail easement through the subdivision.

(Aa214, Aa222-7 to 222-12).

On December 21, 1988, the Planning Board adopted a Resolution of Memorandum required by N.J.S.A. 40:55D-10(g) (Sa1-2; Aa4, ¶ 13). Therein, the Planning Board gave Walker all he had asked for, *i.e.*, everything Walker had represented to the Planning Board and the public as his comprehensive application. The Resolution included those items that Walker had expressly proposed as part of his application, including the conservation easement (Sa2, ¶ 2; Aa90; Aa121-124; Aa172; Aa204; Aa216). The adopted Resolution also included some wholly precatory language, reflecting Walker's expression of intent, that Walker would discuss the possibility of a horse trail easement; as the Resolution and record plainly show, neither Walker nor the Planning Board considered the provision to be a condition for the grant of a horse trail easement (Sa2, ¶ 5; Aa335, Aa341, Aa357).

After the subdivision approval, Hirschberg resisted closing with Walker on a basis unrelated to the Planning Board Resolution approving Walker's preliminary major subdivision application. The matter Hirschberg saw as an impediment to closing was Walker's failure to obtain approvals and/or meet standards of the New Jersey Department of Environmental Protection[9] (Aa267-273; Aa255-7 to 256-4).

On February 14, 1989, Walker filed this action and a parallel action in the Superior Court of New Jersey, wherein the Township, Planning Board, and Hirschberg were named defendants (Aa68

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9. As aforementioned, the contract placed upon Walker the obligation to obtain not only the preliminary major subdivision approval but "all other governmental approvals required in connection therewith" (Aa264, ¶ 13).

to 75).[10]

On July 10, 1989, Walker received an offer of $4,100,000 for the purchase of the property, which Walker rejected on August 28, 1989 (Aa230-231). Between February 14, 1989 and July 10, 1989, Walker had received an unspecified number of other offers on the property, the details of which have not been particularized (Aa259-10 to 259-19).

On May 13, 1991, Walker instituted an action in the Superior Court of New Jersey against certain past and present Planning Board members and Township Committee members and several attorneys to the Township and Planning Board, all in their official capacities, alleging inverse condemnation, violation of constitutional rights, and intentional tort claims.

## REASONS FOR DENYING THE WRIT

The primary reason for denial is Walker's failure to preserve below the issues presented in his petition. Walker's counsel expressly conceded, and expressly declined to challenge, the propriety of dismissing the claims against the Planning Board members in their individual capacities under 42 U.S.C. § 1983 on the basis of their absolute immunity as quasi-judicial officers (June 9, 1989 Letter Brief of Walker's counsel; Aa32). Walker's

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10. On July 7, 1989, the state court granted judgment to Hirschberg and rescinded the contract, deciding Walker was responsible for termination of the contract by bringing a specific performance action against Hirschberg when Walker was unable to perform (Aa76-80).

The state action was dismissed against the Township on October 31, 1989.

By bench decision on August 22, 1991, the state court directed complete judgment for the Planning Board on all of Walker's claims, dismissing the Complaint with prejudice.

counsel also expressly conceded that his taking claim was not ripe, instead arguing to the district court that it should vacate its alternative rationale that there was no taking in order to permit him to ripen his taking claim through a state court inverse condemnation action ("Memorandum in Support of Motion for Reconsideration," pp. 2, 9; Pet. App. 28a). Moreover, the decisions below are based upon the particular facts of this case and do not conflict with any constitutional principles set forth by the Court. No important issues warrant review by the Court.

**A. The courts below properly concluded that the individual planning board members are entitled to absolute quasi-judicial immunity.**

Relying upon *Bass v. Atardi*, 868 F.2d 45 (3d Cir. 1989), the courts below dismissed this suit against the members of the Planning Board in their individual capacities on the basis that "members of municipal planning boards in New Jersey are absolutely immune in their individual capacities from damage actions brought pursuant to 42 U.S.C. § 1983." 868 F.2d at 50. Before this Court, petitioner Walker mischaracterizes the holding of the *Bass* decision and its underlying rationale. Contrary to Walker's contentions, the *Bass* decision and its antecedents are wholly consistent with the authority of the Court.

The Court has long held "that there are some officials whose special functions require a full exemption from liability." *Butz v. Economou*, 438 U.S. 478, 508 (1978). In each case, the Court has undertaken "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." 438 U.S. at 508 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976)). In beginning this inquiry, the actual governmental function performed by the governmental official must be analyzed; the office, in and of itself, may not be the basis for the grant or denial of absolute immunity. *Butz*, 438 U.S.

at 511-12.

It is well settled that judges are entitled to absolute immunity for all acts committed within their judicial jurisdiction, including grave procedural errors. *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978). The policy behind this grant of absolute immunity is simple. If a civil action could be maintained against a judge by virtue of an allegation of malice, judges would lose "that independence without which no judiciary can be either respectable or useful." *Bradley v. Fisher*, 80 U.S. 335, 347 (1872).

Absolute immunity has also been extended to protect those nonjudicial officials whose activities are integrally related to the judicial process and involve the exercise of discretion comparable to that of a judge. In *Butz*, the Court extended absolute judicial immunity to those persons who performed adjudicatory functions within the federal agencies. The Court highlighted the similarity between the functional duties of judges and agency hearing officers:

> The [agency] proceedings are adversary in nature. They are conducted before a trier of fact insulated from political influence. A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitutes the exclusive record for decision. The parties are entitled to know the findings and conclusions on all the issues of fact, law, or discretion presented on the record.
>
> * * *
>
> . . . [The hearing examiner's] powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on

> proffers of evidence, regulate the course of the hearing, and make or recommend decisions. More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures from the parties or other officials within the agency.

438 U.S. at 513 (citations omitted).

The Third Circuit in *Bass*, following the dictates of *Butz*, functionally analyzed the statutorily-defined powers of municipal planning boards in New Jersey and concluded that the duties of planning board members in the State of New Jersey are so integrally related to the judicial process as to warrant the grant of absolute immunity. 868 F.2d at 50.[11] In analyzing these powers, the Third Circuit deferred to the functional analysis of *Jodeco, Inc. v. Hann*, 674 F. Supp. 488 (D.N.J. 1987), where the court painstakingly addressed and reviewed in detail the statutory and functional responsibilities of municipal agencies established pursuant to New Jersey's Municipal Land Use Law, N.J.S.A. 40:55D-1, *et seq.*:

> Under N.J.S.A. 40:55D-10, a municipal zoning agency is required to hold a public hearing on each application for development, adoption,

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11. In fact, a cursory reading of the *Bass* decision readily shows that petitioner Walker has blatantly mischaracterized the underlying principles of *Bass* in his Petition at pages 14 to 19, in that Walker erroneously argues that the Third Circuit applied the principles of absolute immunity to planning boards based upon the individuals simply holding public office without a functional analysis of the quasi-judicial duties mandated by their respective offices and positions.

> revision or amendments of a "master plan." N.J.S.A. 40:55D-10(a). At such hearings, which are required to be recorded either stenographically or electronically, the presiding officer has the authority to administer oaths and issue subpoenas compelling the production of documents and the attendance of witnesses, who must give sworn testimony and be subjected to the rigors of cross-examination. N.J.S.A. 40:55D-10(c), (d), (f). Although technical rules of evidence are not utilized, the agency has the power to "exclude irrelevant, immaterial or unduly repetitious evidence." N.J.S.A. 40:55D-10(e). Furthermore, much like any judicial tribunal, the agency is required to include in its written decision on each zoning application thorough findings of fact and conclusions based thereon. N.J.S.A. 40:55D-10(g). Thus, a decision by any zoning body which is devoid of any justification or explanation for its position can be attacked under the statute as arbitrary and capricious.

674 F. Supp. at 497.

The Third Circuit succinctly concluded in *Bass*, after this detailed functional review that "[w]e need not retravel the path followed by Judge Brotman [in *Jodeco*] to simply say we agree." 868 F.2d at 50. The court concluded that the duties of planning board members in the State of New Jersey are so integrally related to the judicial process as to warrant the grant of absolute immunity. 868 F.2d at 50.

*Bass* simply applies the *Butz* two-part analysis in extending absolute judicial immunity to quasi-judicial officers, *i.e.*, the cloak of absolute judicial immunity must stem "from the characteristics

of the judicial process" and must be "necessary to assure that judges . . . can perform their respective functions without harassment or intimidation." 438 U.S. at 512. Both parts of the *Butz* "test" for extending absolute judicial immunity are met with regard to individual municipal planning board members in New Jersey.

First, the judicial nature of the planning board members' acts in reviewing and approving a preliminary major subdivision application, pursuant to their statutory powers enumerated under N.J.S.A. 40:55D-25, as was involved herein, is facially apparent from New Jersey's Municipal Land Use Law, N.J.S.A. 40:55D-1, *et seq.*

These statutory provisions ensure the independence of the planning board members. Members are appointed for terms of one to four years and may not be removed from office except for cause after a public hearing. N.J.S.A. 40:55D-23. No member may participate in any matter in which he has a direct or indirect personal or financial interest. N.J.S.A. 40:55D-23(b). Notice of the hearings must be given. N.J.S.A. 40:55D-11. The presiding officer is empowered to administer oaths and issue subpoenas. N.J.S.A. 40:55D-10. Witnesses testify under oath and are subject to cross-examination by all interested parties. N.J.S.A. 40:55D-10. The hearings are recorded verbatim. N.J.S.A. 40:55D-10.

The planning board must state its findings of fact and conclusions in each decision on an application. N.J.S.A. 40:55D-10. An applicant may obtain court review of a planning board decision by instituting an action in lieu of prerogative writ in the Law Division of the Superior Court of New Jersey. Rule 4:69 of the New Jersey Court Rules. Walker has instituted such action.

Clearly then, the action of the individual Planning Board

members in considering Walker's application and adopting a Resolution approving the application with certain conditions constitutes the type of quasi-judicial action for which public officials have been held to be absolutely immune from suit, by the Court in *Butz*.

Second, absolute immunity from suit is necessary to prevent the deterrent effect that permitting suit would have on the willingness of citizens to serve as planning board members:

> ". . . [M]any of these local zoning officials serve voluntarily, often at night, without remuneration; yet they expend extensive time and effort in preparing and participating in the land use development of the community. Were this court to hold that these board members are without any immunity, the inevitable consequence would be to deter intelligent civic-minded persons from serving on municipal land use boards. The fear of incurring great expense in attorney's fees, losing time from employment and suffering the anxiety and distress resulting therefrom, could have no other effect."[12]

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12. The New Jersey Appellate Division, in *Anastasio v. Planning Board*, 209 N.J. Super. 499, 507 A.2d 1194, *certif. denied*, 107 N.J. 46, 526 A.2d 136 (1986), highlighted similar public policy considerations in support of its conclusion that planning board members enjoy absolute immunity in their individual capacities:

> We think that the public interest re quires that persons serving on planning boards considering applications for development act with independence and without fear that developers, who will frequently have significant financial resources and the ability to litigate, not bring them into court. The possibility of facing expensive and aggravating litigation as a result of making a decision on an application for development may in a subtle way impact on the decision making process.

209 N.J. Super. at 526, 507 A.2d at 1208.

*Jodeco*, 674 F. Supp. at 498 (quoting *Centennial Land & Development Co. v. Township of Medford*, 165 N.J. Super. 220, 228, 397 A.2d 1136, 1140 (Law Div. 1979)).

In sum, the *Bass* decision applies the two-part functional and policy analysis mandated by the Court in *Butz*. As the functional duties of members of municipal planning boards in New Jersey are so integrally related to the judicial process and immunity is necessary to assure that planning board members can perform their decisional functions without harassment or intimidation, absolute quasi-judicial immunity is warranted.

Contrary to Walker's assertions, the *Bass* decision does not stand for the proposition that all acts of planning board members are absolutely immune. (Petition at 13). Neither does the *Bass* decision apply absolute immunity "across the board," as Walker suggests it does (Petition at 14). *Bass* simply applies the principles enunciated by this Court in *Butz* that require a functional analysis of the duties and responsibilities of planning board members as quasi-judicial duties.

In fact, despite Walker's present denial of the judicial nature of the five public hearings at which his subdivision application was being considered, on November 28, 1988, he became so exasperated with the judicial-like proceedings that he insisted the public hearings be brought to an end, opining three times during the same statement that enough testimony had been taken and enough had been heard from the public (Aa181-4 to 181-6; Aa181-15 to 181-16; Aa182-8 to 182-9).

Walker also asserts that a planning board only acts administratively and without discretion. (Petition at 15-17). He argues that if there is no discretion, then there can be no quasi-judicial function. His interpretation is based on the word "shall" in N.J.S.A. 40:55D-25 which provides that "[t]he planning board

*shall* follow the provisions of this act and *shall* accordingly exercise its power in regard to: [specific types of planning activities]." (emphasis added). However, the use of the word "shall" is not a deprivation of a planning board's discretion but a grant of jurisdiction that delineates the powers of a planning board. A planning board's discretion is used not in determining its duties, but in making decisions on issues arising from the jurisdictional grant. Like a court, a planning board cannot abandon its obligations delineated by the jurisdictional grant. Planning board members must exercise judgment in assessing testimony and credibility, draw factual and legal conclusions, apply the principles delineated in the Municipal Land Use Law, N.J.S.A. 40:55D-1, *et seq.*, and protect the public welfare. All of these quasi-judicial duties were implicated and effected during the planning board public hearings and during the overall process in approving Walker's subdivision application.

Finally, Walker suggests that *Bass* is not in harmony with *Wood v. Strickland*, 420 U.S. 308 (1975), which conferred only qualified immunity upon the individual members of school boards. This case, however, is patently dissimilar. In *Wood*, the Court indicated that its decision was limited to the "specific context of school discipline." 420 U.S. at 322. Furthermore, it is worth noting in *Wood* that the record showed an almost complete absence of quasi-judicial procedure. The students were not allowed to present their own evidence or attend a hearing on the matter. The school board simply began the proceeding by reading a written statement of facts it had previously found in closed session. The students were also not allowed the opportunity to confront or cross-examine their accusers.

Here, in contrast to *Wood*, there were five public hearings, sworn testimony, cross-examination, findings and conclusions drawn by the planning board from the record, rights of appeal, and other quasi-judicial accoutrements.

Thus, Walker's arguments must fail. *Bass* is consistent with the principles delineated by the Court in *Butz*. There are no special or important reasons for granting certiorari. Therefore, the petition should be denied.

**B. The courts below properly concluded that petitioner's taking claim was not ripe.**

In his petition, petitioner Walker posits that "[t]wo (2) of the seven (7) conditions of approval imposed required granting a conservation easement on approximately fifty (50) acres (condition #2) and a trail easement (condition #5) through the private property consisting of the nineteen (19) new residential building lots" (Petition at 9). To the contrary the district court specifically concluded that the undisputed facts of record were that the "conditions" (which include the conservation easement, and that Walker discuss the possibility of a horse trail with the trail association — *not* a horse trail easement) were *proposed* by Walker, *not imposed* by the Planning Board (Pet. App. 21a).[13]

Based upon this infirmity alone, the petition should be denied. Certiorari should be denied when review is sought of a lower court decision which turns upon an analysis of the particular facts involved. The Court simply does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also Texas v. Mead*, 465 U.S. 1041 (1984) (Opinion by Justice Stevens respecting the denial of certiorari). The Court has also long held that it is improper to take a case to review a factual issue where the findings of fact made by the district court receive the concurrence of the court of appeals. "[A] court of law, such as this Court . . . cannot

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13. Furthermore, no horse trail easement was imposed. The Planning Board merely asked Walker to consider the possibility, conceding it could not require it. Walker considered the possibility and decided against it. There is no horse trail.

undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

In any event, the courts below followed the established principles of the Court in determining Walker's taking claim is not ripe. In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), the Court recognized two requisites to ripeness of a taking claim.

First, the government entity charged with implementing the restriction that allegedly effects a taking must have reached a "final decision" regarding the application of the restriction to the property at issue. 473 U.S. at 186. Second, the claimant must have sought and been denied compensation through the procedures the State has provided. 473 U.S. at 194. The second requisite applies only if the State's procedures are "adequate . . . for seeking just compensation." 473 U.S. at 195. Failure to meet either of these requisites will result in dismissal on the basis of the ripeness doctrine.

To meet the "final decision" requisite, complaining property owners must submit a plan for development to the appropriate governing body. 473 U.S. at 187. Additionally, property owners must avail themselves of the opportunities to obtain administrative relief in the event of an unfavorable decision by such body. 473 U.S. at 187. A request for a variance or a waiver from the regulatory restrictions are examples of the types of relief that must be sought.[14] This level of "finality" is necessary in order to assess

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14. In *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981), the Court held that a specific application challenge to a mining restriction statute was not ripe because the property owners did not seek (Cont'd)

"the economic impact of the challenged action and the extent to which the restriction interferes with reasonable investment-backed expectations," two significant factors in the taking analysis. 473 U.S. at 190-191.

To meet the "sought compensation through State procedures" requisite, a complaining property owner must use available state procedures and be denied just compensation. 473 U.S. at 195. *Williamson* states: "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194 (citation omitted). A property owner suffers no deprivation under the Fifth Amendment until the owner has unsuccessfully attempted to obtain just compensation through state procedures. 473 U.S. at 195.

Based upon these established dual ripeness principles, Walker's taking claim is deficient. First, Walker cannot meet the "finality" requirement recognized by this Court in *Williamson*. One measure of the lack of finality is Walker's instituting his taking claim action in federal court prior to the completion of his state court action, which he had instituted to obtain a vacation of the challenged Planning Board Resolution.

Additionally, this lack of finality is more glaring than that described in *Williamson* because here the Planning Board resolution that allegedly imposes conditions upon the subdivision was simply an adoption of Walker's subdivision plan complete with Walker's conditions. If Walker was not happy with his subdivision plan, he might have submitted a new or revised one

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(Cont'd)
administrative relief by requesting a variance or waiver. Such avenues were mandated because a "mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions." 452 U.S. at 297.

which may have been accepted. While New Jersey's Municipal Land Use Law confers certain rights upon an applicant, like Walker, whose preliminary major subdivision application is approved, N.J.S.A. 40:55D-49, nothing in the statute precludes Walker, despite the approval, from commencing a new and different preliminary major subdivision application on the same piece of property.[15]

*MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), is instructive. The Court there held that a County Planning Commission's rejection of a subdivision plan was not final and definitive because some development still might have been permitted by the Commission. 477 U.S. 351-52. As in *Williamson*, the Court required the landowner to do more than just submit a development proposal and have it rejected before satisfying the "final decision" requirement. The extra step required was a resubmission of the plan to see what development would be permitted.

For both of these reasons, Walker fails to meet the "finality" requirement. Therefore, his claim is not now ripe for adjudication.

Second, Walker also has failed to meet the "sought compensation through State procedures" requisite to ripeness as well. He seeks to excuse this deficiency, however, by arguing that "[p]ursuit of a compensatory scheme in New Jersey State Superior

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15. What Walker is actually seeking is court approval of a subdivision plan different from the one that he presented and the Planning Board approved. One of the difficulties with a court sitting as a planning board on a new subdivision plan (apart from usurping the Planning Board's statutory authority) is that the members of the public are thereby deprived of their statutorily guaranteed due process rights. N.J.S.A. 40:55D-12(b) (notice shall be given to all property owners within 200 feet of the property); N.J.S.A. 40:55D-10(d) (during the hearings "the right of cross-examination shall be permitted to all interested parties").

Court is an unreasonably imposed hurdle" because the New Jersey remedy is "limited to market value and interest due to delay and does not afford the panoply of remedies available in U.S. Court under 42 U.S.C. § 1983." (Petition at 21). Yet, this is the same type of condition imposed by the Court in *Williamson*.

New Jersey has the type of procedure, contemplated by *Williamson* and its progeny, that Walker *must* invoke and by which *relief need be denied* by a New Jersey court before Walker reinstitutes federal suit. *See Peduto v. City of North Wildwood*, 696 F. Supp. 1004, 1009 (D.N.J. 1988), *aff'd*, 878 F.2d 725 (3d Cir. 1989) (where the district court noted that New Jersey plaintiffs need invoke the state inverse condemnation procedure before filing a federal taking claim).

New Jersey's inverse condemnation procedure finds its origin in the state's eminent domain statute. N.J.S.A. § 20:3-1, *et seq.* Under New Jersey common law, a mandamus procedure exists, based on an alleged violation of state and federal constitutional just compensation guarantees, to compel the government to initiate condemnation procedures. *See In re Jersey Central Power & Light Co.*, 166 N.J. Super. 540, 544, 400 A.2d 128, 129 (App. Div. 1979).

Walker bears the burden of demonstrating that the state procedure is inadequate or unavailable. *Williamson*, 473 U.S. at 196-97. Such burden is not met by Walker's assertion that the New Jersey remedy is inadequate as it does not mirror the remedies under § 1983.[16] This argument fails to realize that the "sought

16. The Ninth Circuit has also twice addressed this issue and under its analysis, Walker's inadequacy argument fails. In *Sinaloa Lake Owners Ass'n v. Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1317 (1990), the landowners' federal claim which sought taking compensation after the State breached a privately owned dam and destroyed a lake, was not ripe because the landowners failed to exhaust State law procedures. The claimants (Cont'd)

compensation through State procedures" requirement has nothing to do with remedies. It was imposed by the Court as a requisite to ripeness of a taking claim under the Fifth Amendment. No Fifth Amendment violation occurs until just compensation is denied.

*Williamson* clearly teaches: "[B]ecause the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action . . . is not 'complete' until the State fails to provide adequate compensation for the taking." 473 U.S. at 195.

Even if someday the Court were to deem it appropriate to reconsider the requisites-to-ripeness principles of *Williamson*, in

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(Cont'd)
tried to establish the inadequacy of the State procedures by focusing the court's attention on the delay involved in the State system and the lack of sympathy the State courts had previously displayed for private owners. The Ninth Circuit held that the claimants' bare assertion that their case would not go to trial for four years or more under the State system was not enough to show the futility of resorting to State relief. 882 F.2d at 1403. Nor did the landowners' assertion that the California State courts were unsympathetic to private owners in just compensation cases advance their argument.

Similarly, a landowner in *Austin v. City & County of Honolulu*, 840 F.2d 678 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988), attempted to convince the Ninth Circuit that even though he did not seek compensation in the State courts, his claim was ripe because the State procedures were not "reasonable, certain and adequate." 840 F.2d at 680. Although the court found no Hawaiian case that recognized inverse condemnation as a cause of action, it said Hawaii's procedures were adequate within the terms of *Williamson*. 840 F.2d at 681. The court so held because despite there being no cases recognizing inverse condemnation, neither were there any rejecting it: "Until the State courts establish that landowners may not obtain just compensation through inverse condemnation actions under any circumstances, Hawaii's procedures are adequate." 840 F.2d at 681.

light of the Court's determination in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), as Walker suggests (Petition at 22), the present action is not the case in which to do so. In this case, the conservation easement was given by Walker, not taken by the Planning Board, and there is no horse trail easement. Additionally, Walker assiduously avoids the sharp distinction between the possessory public access easement at issue in *Nollan* and the nonpossessory, nonpublic conservation easement to protect and preserve environmentally-sensitive areas (wetlands, critical slopes, flood hazard areas) from disturbance here (Aa204, 216). Walker merely alludes to this distinction in the context of his argument that he does not expect the New Jersey state courts to consider the conservation easement here to be a taking of an interest in land. (Petition at 21). Neither would the *Nollan* Court, which states that a taking requires a physical occupation of the property by the government or others, and that

> [A] "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

483 U.S. at 832.

## CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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September 12, 1991